

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

**PLAINTIFFS' SURREPLY TO DEFENDANTS' LIVINGSTON, STEPHENS AND
THALER'S MOTION TO DISMISS**

In Plaintiffs' Response to Defendants' Livingston, Stephens, and Thaler's Motion to Dismiss they provided the Court a citation to the National Weather Service's website for the following quotation included in the complaint:

Heat is the number one weather-related killer in the United States, resulting in hundreds of fatalities each year. In fact, on average, excessive heat claims more lives each year than floods, lightning, tornadoes and hurricanes combined.

In fact, the quoted passage appears on the webpage of the National Oceanic and Atmospheric Administration, a federal agency that includes the National Weather Service.¹ Defendants are correct, the National Weather Service website cited in Plaintiffs' response states heat is but "one of the leading weather-related killer[s]," rather than the "number one" killer. Plaintiffs' counsel sincerely regrets the citation error, but stands by the National Oceanic and Atmospheric Administration's findings.²

In either case, the point is not whether heat is the "number one weather-related killer" or merely "one of the leading weather-related killers." This distinction misses the forest for the trees. Extremely high temperatures, like those indoors at the Hutchins State Jail, are known to kill people – whether you believe the National Weather Service or the National Oceanic and Atmospheric Administration. Unlike *Woods v. Edwards*, where the temperatures were merely "uncomfortable" and the *pro se* plaintiff "failed to present medical evidence of any significance [or] identif[y] a basic human need that the prison has failed to meet," Hudson, James, and Adams were killed by the extreme indoor

¹ National Oceanic and Atmospheric Administration, "Heat Wave: A Major Summer Killer," <http://www.noaawatch.gov/themes/heat.php> (last visited November 1, 2013).

² Of course, this error merely highlights that the Plaintiffs' raise a factual dispute – is NOAA or the NWS correct? – making resolution of this case at the motion to dismiss stage inappropriate. Plaintiffs' Amended Complaint's assertion that heat is the "number one weather-related killer" is presumed true for purposes of this motion, regardless of whether it is the "number one" or merely "one of the leading weather-related killers." See, e.g., *Lindquist v. City of Pasadena*, 525 F.3d 383, 386 (5th Cir. 2008).

temperatures. 51 F.3d 577, 581 (5th Cir. 1995) (per curiam).³ Temperatures at the Gurney Unit were not merely uncomfortable – they were deadly. And Livingston knew these conditions in his prisons would kill people – especially heat-vulnerable people like Hudson, James, and Adams. But he tolerated and approved these conditions, and, as a predictable result, men died.

Plaintiffs' Amended Complaint adequately alleges facts sufficient to deny Livingston, Thaler, and Stephens' Motion to Dismiss.

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Respectfully submitted,

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³ And, following its opinion in *Woods*, the Fifth Circuit has repeatedly stated dangerously high temperatures violate the Eighth Amendment. See *Blackmon v. Garza*, 484 Fed.Appx. 866, 869 (5th Cir. 2012) (unpublished); *Valigura v. Mendoza*, 265 Fed. Appx. 232 (5th Cir. 2008); *Gates v. Cook*, 376 F.3d 323, 334 (5th Cir. 2004).

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CERTIFICATE OF SERVICE

By my signature above, I certify that a true and correct copy of the foregoing has been served on all counsel of record through the Electronic Case Files System of the Eastern District of Texas.